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Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK

Keywords: Childhood, Age, Migrant, Category, Asylum

Abstract

This paper challenges the focus on age 18 as an exclusionary point in law for migrant young people, particularly unaccompanied migrants, with insecure legal status. Initially meant to provide a protective category of 'childhood' in law, focus on age 18 creates a sharp transition point in law for young people. This chronological concept of age does not match up with the reality of lives of many young people who step into adulthood without being able to live in a self-supporting manner. Law recognises the constraints and provides some respite for British national children who are in care, however, non-UK migrant and/or asylum-seeking young people in this situation are immediately at risk of losing their liberty. We suggest that non-British migrant young people aged 18–21 should be treated as a youth category in a manner similar to that used for British young people in care.

Introduction

This paper challenges the focus on age 18 as an exclusionary point in law for migrant young people with insecure legal status, particularly unaccompanied migrant youths without immigration status. It draws on examples such as the more gradual treatment of British children in care and the way age assessments are carried out for migrant children using a standard which encompasses social and cultural factors in understanding age (the Merton standard). These examples challenge the sharp transition approach (from childhood to

adulthood) that is particularly harmful for migrant youths who are de-recognised from any kind of membership in community. [1]

There are different scenarios in which migrant children become subject to age related issues. They may be identified prior to turning 18, and then lose entitlements to certain rights upon turning 18 or they may arrive in the UK after they have turned 18, and therefore never get the benefit of child-friendly entitlements. We argue, that in all such instances, because of the additional vulnerabilities of unaccompanied youth, it is imperative that migrant youth aged 18–21 should also be treated as a special youth category in a manner similar to British children in care. In the section that follows, we first examine why age matters for migrant children in accessing universal rights, how age forms the basis for their legal recognition, and we look closely at how age assessment procedures include varying markers of childhood. We then compare the "staying put" arrangements for British children in care between age 18 and 21 and contrast these with the situation of foreign born precarious-status holder children who were also in care until age 18.[2] These examples challenge the sharp transition approach that instantaneously de-recognises migrant youths at age 18 and, instead, support the case for the creation of a youth category for better consideration of best interests in law and policy. A youth category would protect migrant youths from harsh immigration consequences immediately upon turning 18.

[1] The Home Office also treats 18-25 year olds slightly differently for purposes of private life in UK in immigration rules and guidance. See https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-7-other-categories ; last accessed 14th January 2019 and https://www.gov.uk/uk-family-visa/private-life ;last accessed 14th January 2019.

2 Young people, up to the age of 24 or 25, may receive continued support if they are in full time education or have special educational needs. See Part 5 of Children and Families Act 2014.

Why Age Matters for Migrant Youth: Ali's Story

In a landmark case on age assessment, *R (on the application of AA (Sudan)) v Secretary of State for the Home Department* [2017] EWCA Civ 138 (9 March 2017), we learn of the life of a young person named Ali and his treatment by the Home Office. Ali arrived in the UK from Sudan in July 2014. He was assessed, based on physical appearance only, to be over 18 and put in immigration detention for purposes of deportation. Shortly after, social workers completed a detailed age assessment as per legal requirements and concluded that he was a child. Yet, the Home Office continued to detain him based on the previous visual assessment that he was over 18. The question for the court was whether it was lawful to make these age assessments based on a "cursory glance". The court found unanimously that to detain an unaccompanied asylum-seeking child on this basis was unlawful.

Ali's story is a poignant one, but it is consistent with other practices of wrongful detention of migrant children. Earlier incidents of wrongdoing in age assessment by the Home Office included the Home Office paying compensation of more than £1m, plus £1m costs, in a case involving 40 child asylum seekers who were wrongly detained as adults in 2012 (Taylor 2012). Despite the large pay-out (which must have generated awareness of legal duties with respect to migrant youths), the Home Office detained Ali in an illegal manner. Perhaps this is because the context of a hostile environment towards illegal migration encourages an adversarial approach to age assessments of migrant youth. It is commonplace for the Home Office to dispute their age and to seek to establish that they are adults thereby depriving them of the special protections to which children are eligible. Disputing age has become routine. For instance, in 2016, 1,945 unaccompanied children claimed asylum in Britain. Of these, 918 of the asylum applicants had their age disputed (Refugee Council 2017). Crawley (2007, 3) analyses this as: "age disputes and the process of age assessment [have] risen rapidly up

the policy agenda, in many ways becoming a 'touchstone' issue for a wide range of other concerns about the Government's approach to asylum seekers in general, and to separated asylum seeking children in particular".

Such routine contestations have severe impacts on asylum-seeking youths. Given that being a child is of critical importance in asylum proceedings, for young people who are in the transitory period between childhood and adulthood it is essential to establish that they are children for the purposes of the law. If a person is treated as a child, they can receive state support, but if they are treated as an adult they lose their freedom and become deportable. This is a sharp demarcation which only relies on a chronological concept of age; treating the number 18 as a magical one of transformation.

Accessing Universal Rights as Youth without Secure Legal Status

Hannah Arendt has identified the right to have rights as a universal right without which there is no "acknowledgement of the right of every human being to belong to some community" (Benhabib 2005, 3). Without legal recognition, there is no social membership. Bhabha (2009) has called undocumented children "Arendt's children" because of their lack of societal membership. However, migrant children do get some protection from human rights law which is protective of children below 18. For instance, Article 1 of the UN Convention on the Rights of the Child (UNCRC) defines a "child" as "a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger". The idea of delimiting a period as protected arises out of the view of children as vulnerable during the developmental phase. The presumed innocence of children, and the need to protect them from any adverse actions taken by adults in their lives, is reflected in the provisions of the UNCRC (Freeman 1992).

For migrant youth around age 18 there is a complete lack of membership in the communities from which they seek to assert their rights (Krause 2008, 338). Perhaps we can call them "Arendt's youth" because they experience the loss of home and loss of social texture with which they are born which Arendt identifies as typical of a stateless life experience.[3] Migrant youth do not belong to any distinct place in the world (Kesby 2012, 6). As Arendt writes (1973, 296), the right to have rights operates to provide a means "to live in a framework where one is judged by one's actions and opinions and a right to belong to some kind of organised community". Only when this meta-right is achieved are there specific rights – such as to life, liberty, property, the pursuit of happiness – to be realised (Hann 2013). The right to have rights expresses the need to guarantee to each individual "a place in the world which makes opinions significant and actions effective" (Arendt, 1973, 296). Age safeguards this right in many human rights provisions but over the age of 18 vulnerable young persons simply fall out of the safety net.

Article 1 of the UNCRC recognises that age markers can move depending on the social circumstances of children (Thatun and Heissler 2013, 99; Besson 2005: 433). Thus, in some poorer countries children may be allowed to work in certain jobs much earlier in their lives than in more developed economies. The protective period of childhood becomes shortened for these youth. However, when social circumstances demand a longer period of childhood, the UNCRC is silent. This cap without possibility of extension is at odds with the general thrust of the UNCRC which recognises that childhood is a gradual phase of evolution (physical, mental and emotional) (Lansdown 2005).

[3] See also Bernstein (2005) and Blitz and Otero-Iglesias (2011) on Arendt's concept of statelessness.

There are many relative conceptions of childhood which are developmental or societal in nature that could easily shift the transition point of childhood. While ideally immigration and asylum systems should treat all individuals fairly, it is important to use the role of law in creating specialised categories for heightened protection to safeguard vulnerable youth at immediate risk of detention or deportation. As Federle (1993, 987–999) notes, young people have a special capacity to flourish which should be nurtured in law and policy for a length of time.

The best interests principle, drawn from the UNCRC, recognises the special needs of youth and forms part of nationality and immigration legislation (e.g. section 55 of the Borders, Citizenship and Immigration Act 2009 which requires the Home Office to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK).[4] Migrant children can draw on it as a substantive right, as well as a fundamental interpretive legal principle. For migrant children, who have very little else to draw upon, this principle is very important, although in practice several studies note implementation gaps in the field (e.g. in the UK, Crawley 2007, 2011; Humphris and Sigona 2017; and Prabhat and Hambly 2017; or in Sweden, Lundberg 2011; and in the USA Bhabha 2004, 40). "Best interests" conceptually acts as a thread between various immigration and nationality laws but, as of now, cannot assist youth who are on the threshold of 18 or over it.[5]

4 See also, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 where the Supreme Court held that when a parent is threatened with deportation, the best interests of their child (or children) must be considered.

5 Historically, migrant children have been given less preferential treatment than national children in the UK because the 1989 UNCRC, as ratified by the UK, did not apply to foreign-born precariously placed children in the UK until 2009. Although most countries have ratified the UNCRC and it is widely accepted as the established source of rights for children, the UK ratified the UNCRC with a reservation that it would not apply to immigration and nationality cases. This meant that foreign-born children had no concrete claims to universal human rights in the UK if they had been under immigration control or

The specific duty of care towards children is governed by the Children Act 1989 (as amended in 2008). Section 20 of the Act states that every local authority shall provide accommodation for any child in need within the area who requires accommodation if there is no person who has parental responsibility for him/her (Coram Children's Legal Centre 2017). These duties towards unaccompanied migrant children come to an abrupt end at age 18 (see Sigona, Chase and Humphris 2017). When a child reaches 18 years old the duty to the young person is held within the Care Leavers (England) Regulations 2010. This Act was amended in 2014 to require that such duties are fulfilled with regard to the circumstances and needs of unaccompanied or trafficked children. Data are particularly scarce for former unaccompanied asylum-seeking children (UASC) who are care leavers and their trajectories once they reach 18 years and are no longer considered to be children. This lack of knowledge is increasingly problematic as the Immigration Act 2016 changes the nature of support for UASC care leavers who are "appeal rights exhausted".

Once the regulations have been approved and guidance issued, former lone children who have reached adulthood in the UK and have not established a protection claim for asylum will no longer be supported by local authorities but by the Home Office, with minimal access to support and few legal pathways to settlement.[6]

were asylum seekers. Now, the lifting of the reservation has facilitated the creation of specific duties and obligations towards these children.

0[6] The introduction in July 2016 of the National Transfer Scheme allows the duty of care for a child to be formally "transferred" from one local authority to another. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687226/NTS_Protocol_Final_-_March_2018.pdf. Previously a local authority would take responsibility for any unaccompanied child who came to its attention.

Youth over the age of 18 who exhaust their appeal rights become subject to increasing levels of immigration control. If they fail to obtain asylum, they can be forcibly removed from the UK.[7] Further, the UK is the only country in Europe where there is indefinite detention for migrants with irregular legal status.

Despite the serious repercussions, the reduction in legal aid available for asylum cases means that many young people must now represent themselves in court.[8] They are often unable to leave the UK because of fears for their security in their countries of origin. Many, who may have been in care when under 18, are forcibly returned when they turn 18, while others continue to exist in a state of limbo without access to education and safe housing. For migrant children age is all that stands between access to education and other support or full consideration of asylum applications and detention or deportation (Judge 2010). While migrant youth have great potential to contribute, and often identify as British because of spending formative years here, they are unable to access resources for further education at age 18. Meloni and Chase (2017) find that some youth choose to disengage from statutory services around age 18 because of their fear of detention and forced removal. Thereafter they enter the informal economy and are at risk of homelessness and destitution. They also suffer from poor mental and physical health. They become invisible in the eyes of the law.[9]

A concrete example can be seen in data from 2007 to early 2016 on young care leavers: 2,748 young care leavers had been returned to their countries of origin; the majority, 2,018, had

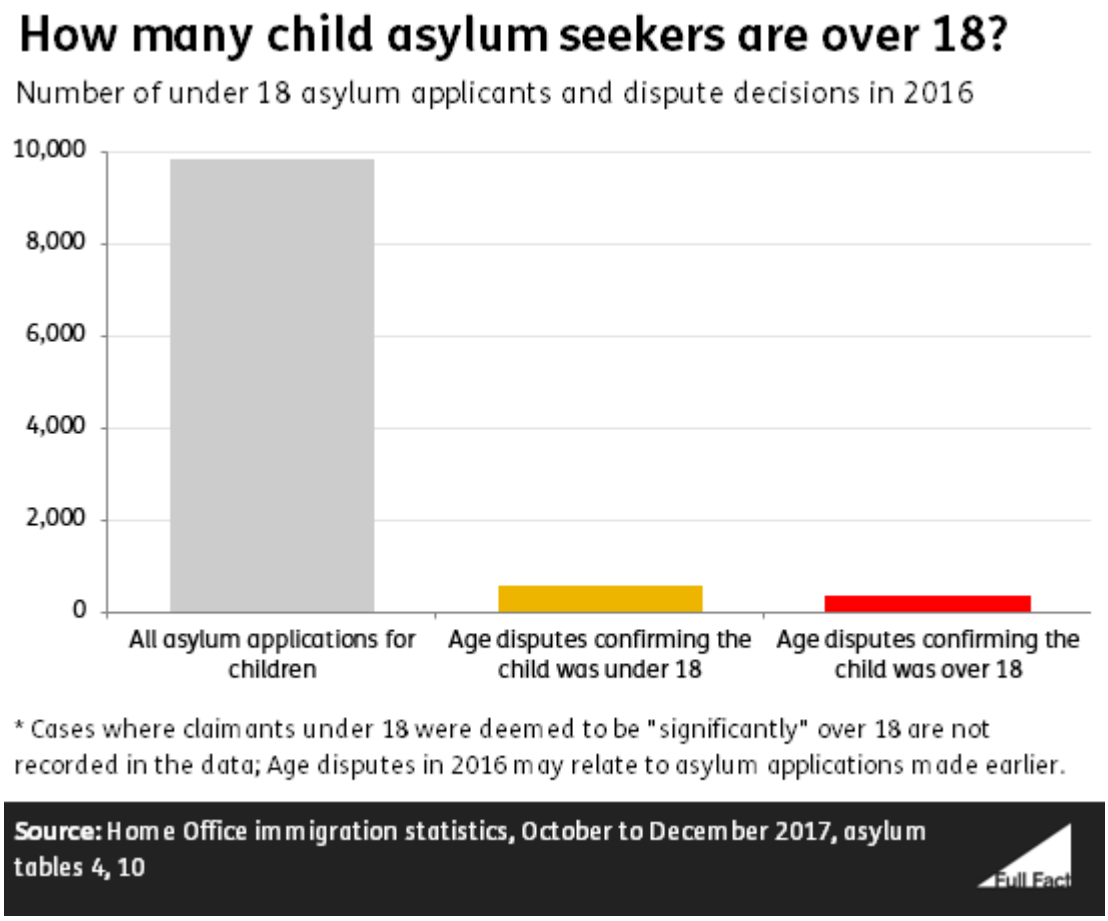
7 See the Immigration (Removal Directions) Regulations 2000 for details.

8 Asylum remains within the scope of legal aid but children sometimes shift in and out of different migration categories, and some are not officially seen as asylum seekers (and so outside scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012): see Coram Children's Legal Centre (2018) report on legal aid and House of Lords *Children in Crisis* report (2016).

9 Nationality, Immigration and Asylum Act 2002, para. 6 of Schedule 3.

been returned to Afghanistan (GDWG 2017). The significance of this point of exclusion can be seen in the figures on forced and "voluntary" returns. For example, the total number of forced returns in 2016 included 24 children under the age of 14, one aged 14–15, none aged 15–16 and 605 aged 18–19.[10] "Voluntary" returns of 24,202 in the same year included 1,837 children under the age of 14.

The following figure (Full Fact 2018, using Home Office Statistics) shows the number of applicants under the age of 18 in 2016.



[10] https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/returns#data-tables

The figure shows all asylum application cases that included children in 2016. In 2017, the UK recorded 2,205 asylum applicants who were unaccompanied minors.[11]

However, these official asylum figures cannot "capture" the complete picture, as data do not include yet unresolved cases. The data problems at a global level in regard to migrant and asylum-seeking children are discussed in detail in Singleton (2018). In the UK, the complexity of the system, problems in gaining access to legal advice and unrecorded administrative decisions made in many different locations, all add to the difficulty of monitoring what is happening at any one time. Distinguishing between the recording of administrative "events" and of the movements of an individual is often not possible, which compounds the problem of following applicants through the system or being able to monitor cohort effects. Thus, it is impossible to know how many children have been denied the possibility of such protection. What is known is that the gaps in the data indicate potential areas of concern when the asylum process is suspended, when the children become lost in the administrative records and/or at the point when individuals reach the age of 18 and "disappear" from the system. It is also estimated that more than a quarter of trafficked children go missing from care.[12] End Child Prostitution and Trafficking (ECPAT) UK and Missing People have estimated that "500 unaccompanied asylum-seeking children went missing at least once in the year to September 2015, while 207 [had] not been found".[13]

At this point an unknown number of youth become "invisible", disappearing into the informal economy and vulnerable to trafficking for labour and/or sex exploitation.

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11 Eurostat (2018) http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00194&plugin=1.

12 ECPAT https://www.ecpat.org.uk/child-trafficking-statistics.

13 https://www.ecpat.org.uk/heading-back-to-harm-a-study-on-trafficked-and-unaccompanied-children-going-missing-from-care-in-the-uk

The picture across England and Wales is obscured as local authority data are either not available or are withheld by a large number of local authorities (Humphris and Sigona 2017). What is crystal clear is that for many youth who migrate under distressful conditions, being under age 18 is the only safeguard in Britain; the key to the Arendtian 'right to have rights'. But how is this right to have rights translated into practice for migrant youth on the cusp of adulthood? To understand their experiences, and to examine the relative notions of childhood, we draw on examples from age assessment of asylum seekers and of children in care.

Asylum and Age Assessment: Relative Notions but Fixed Threshold

Giner (2007) writes that child asylum seekers act as moral touchstones of society. In theory children are entitled to considerably more favourable treatment than adults in the asylum process, but in practice they are much less likely than adults to obtain a full legal status as a refugee. Most often children are found eligible for discretionary leave to remain until the age of seventeen-and-a-half, or for three years, whichever is sooner, unless there are "safe and adequate reception arrangements" in their country of origin (Finch 2011, 119). This means that children have even less certainty about their long-term legal status than adults. Uncertainty of legal status creates psychological pressure on children (Chase et al 2017; see also Eastmond and Asher 2011; Bloch 2014).

While there is a general sense of greater responsibility towards children in British national legislation, Crawley points out that children who fail to conform to dominant notions of what it means to be a "child" and how children should look and behave may not be accepted as being children at all (Crawley 2007, 2011). This often harms asylum-seeking children because their life experiences could expose them to sexual and physical violence from an early age and render them outside the "innocent" child paradigm. Such children then lose

their place in society as “deserving” children and become closer, in administrative eyes, to the adult asylum seekers who are treated as national security risks. The risk of this happening increases the older the child is in age.

Given these preconceptions about the asylum-seeking child, how is their age assessed? In law biological age is the main, almost exclusive, criterion for the identification of a human being as a child. However, to ascertain the biological age of an individual is not always an easy task, not least because not everyone has their birth registered when they are born or has a document to prove it. In the case of irregular migrant youth, this may be even more complicated because when migrant children cannot provide evidence of their age their age is likely to be disputed. Such children then become parties to age determination proceedings in which they are referred for age assessment by social workers.

Social workers in the UK assess age based on what a young person tells them about their life history and from developmental clues. In most of Europe, with a few exceptions where there is a minor role for social history (for example, in Sweden), determination of age depends wholly on X-rays and physical examination. The Home Office has not always agreed with the UK approach and has sought to shift the balance in favour of a more medicalised process, mainly through the promotion of dental X-rays (see Home Office 2007, 12). Commentators have also criticised how the current “subjective” approach often creates a culture of disbelief in the accounts provided by children. However, countries which only rely on “objective” medical (physiological) evidence of age are also criticised for relying on invasive and crude methods of age determination. Any assessment is complicated by institutional and possibly political pressure on social workers to over-estimate the age of young people. Yet, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children outside their Country of Origin, in particular paras.19 and 20, sets out the centrality of the best interests

principle "during all stages of the displacement cycle".[14] Article 3 of the UNCRC places a positive obligation upon states to ensure that the age assessment process for UASC is conducted in the best interests of the child. The Committee on the Rights of the Child has made clear that this requires taking positive steps to ensure it is as efficient, timely, accurate and safe as possible and that, where a margin of error does prevail in borderline cases, the benefit of the doubt is automatically applied.[15] Crawley (2007, 197) recommends that the "benefit of the doubt" should be given to the young person at the very outset in order to avoid protracted assessments. Some young people come from cultures where precision about age is less important than in the UK and they may not know exactly how old they are and this further complicates disputes about their age. Despite these insights, age assessment procedures are frequently used to exclude children from asylum (Crawley 2007; Biocchi and LeVoy 2008; Kvittingen 2010). Procedural challenges also mean that a child may be assessed multiple times and by different local authorities. Indeed, it is possible for them to turn 18 before the whole process concludes thereby causing them to lose out entirely on any benefits (Crawley 2007, 72).

In *R (B) v Merton* [2003] EWHC 1689 (Admin),[16] the High Court set down broad guidelines as to how age ought to be assessed in respect of unaccompanied minors who arrive in the UK without documentary evidence to prove their age. The court confirmed that the local authority "cannot simply adopt a decision made by the Home Office" and outlined a number of criteria for a lawful assessment. These criteria do not focus only on the physiological age of children (medical test-oriented) but also assert the importance of their overall situation, including their appearance, social history, family circumstances, educational background and activities

14 www.unhcr.org/uk/protection/migration/4bf687729/convention-rights-child-general-comment-6-2005-treatment-unaccompanied.html

15 See Home Office publication on assessing age (Home Office 2018, 7).

16 www.bailii.org/ew/cases/EWHC/Admin/2003/1689.html

during the previous few years and credibility. Ethnic and cultural information may also be important. Although Merton assessments are not perfect and are often used to demonstrate children may be lying about their ages (Crawley 2007), there are many protective features in the Merton assessment process including a face-to-face meeting with the young person, the setting-out of the general background of the applicant, and adherence to established standards of fairness. There is a duty on decision-makers to give reasons for a decision finding that an applicant claiming to be a child is not a child. The young person should be given an opportunity during the assessment to answer any adverse points the decision-maker may consider. If the decision-maker is left in doubt, the young person should receive the benefit of that doubt. A young person also has a right to be accompanied during the assessment by an appropriate adult. These features, based on children's rights and best interests perspectives, are laudable objectives. For the purposes of arguing for a youth category it is most relevant that Merton assessments contain notions of relative childhood. Yet these assessments are still constrained by a focus on age 18. Once a young person is assessed to be 18, they no longer benefit from any special treatment.[17]

Children in Care and Staying-put Arrangements: 18–21 as a Youth Category?

In England children in care can benefit from "staying-put" arrangements which means they can continue to live with their foster carers until age 21 (also in some instances until age 21–24). In the past, many young people already stayed with their foster carers beyond age as a matter of mutual agreement, but the law changed in May 2014 so that now all local authorities must support such arrangements. The sole considerations are that such

[17] See also, DS (Afghanistan) v SSHD [2011] EWCA Civ 305, [54] ('Does membership cease on the day of the person's eighteenth birthday? It is not easy to see that risks of the relevant kind to a person who is a child would continue until the eve of that birthday, and cease at once the next day'); KA (Afghanistan) v SSHD [2013] 1 WLR 615, [18]. There are many other cases in which there are similar observations. While the contexts are slightly different, the underlying concern in the cases is the same.

arrangements should be in the young person's interest and the young person and the foster carer should be willing to engage in the process. Staying-put arrangements recognise the benefits of shifting the age threshold of childhood. Studies by Wade, Mitchel and Baylis' (2005) and Wade et al. (2012) suggest that foster care is largely positive for those young people receiving it (see also Chase et al. 2008). Research in the USA by Courtney and Hook (2017) finds that children who remain in foster care longer (until age 21 rather than 18, for instance) have statistically measurable higher educational attainment when controlling for all other aspects (race, gender, etc.).

Many asylum-seeking children become looked-after children if their families are absent from the UK. Under section 20 Children Act 1989 such children are entitled to leaving-care services up to at least the age of 21. However, eligibility for support from a local authority post-18 is determined by the young person's immigration status as the leaving-care provisions of the Children Act 1989 fall within Schedule 3 of the Nationality, Immigration and Asylum Act 2002 and relevant provisions of the Immigration Act 2016. In practice, young people who arrive in the UK within 13 weeks of their 18th birthday will not qualify for full leaving-care services even if they have been provided with support under section 20 Children Act 1989 for the weeks leading up to their 18th birthday, as they will not have been "looked after" for 13 weeks or more. For some unaccompanied migrant children support terminates at age 18. Most young people without close families benefit from the familial support offered by foster carers, so it is not clear why asylum-seeking youth should be prematurely deprived of such support.[18] The loss of access to services at the age of majority is a significant problem for vulnerable youth (Osgood, Foster and Courtney 2010). Yet

[18] ESRC Seminar Series 2014: "Teenagers in foster care: the critical role of carers and other adults " November 11. See http://reescentre.education.ox.ac.uk/wordpress/wp-content/uploads/2015/03/ESRC-seminar-Migrant-Children-Foster-Care-report.pdf.

official documents, such as the Department for Education's consultation and guidance on Corporate Parenting Principles, specify that unaccompanied migrant children are to be treated the same as any other children by local authorities. In November 2017, for instance:

> An unaccompanied child is entitled to the same local authority support as any other looked after child, and our ambitions for these children are the same: to have a safe and stable placement, to receive the care that they need to thrive, and the support they need to fulfil their educational and other outcomes. (Department for Education 2017, 9)

Given that there is evidence that a longer nurturing period helps child development, why is such a period only adopted for the protection of national children in the UK? Perhaps a clue can be obtained from research in the field of childhood studies. Frijhoff (2012) writes that childhood reflects who we are as adults in society. What our society prioritises as childhood tells us more about us than about children. Thus, childhood is as "much a fact of a biological and psychological nature as a cultural notion that through the centuries has been the object of changing perceptions, definitions, and images" (Frijhoff, 2012, 11). The "othered" gendered and racialised image of foreign youths, particularly male youths, is associated with national security concerns. Youths who prematurely become independent, or who come from cultures where they assume adult responsibilities earlier than in the UK, do not fit into the image of the "deserving" child who needs protection. This is true even if the child has spent years growing up in Britain and assuming a British identity; their foreignness seeps into their adolescent years. Thatun and Heissler (2013, 99) point out that there is a binary conception of children: either they are innocent and in need of adult nurturing, or they are incorrigible and in need of punishment. Goldson (2002) calls this the "deserving–undeserving schism" via which a young person is either a victim or a threat. Racialised "popular" narratives of the young male migrant also reinforce portrayals of the victim as simultaneously a security

threat. Writing about young men who seek asylum, Ruth Judge similarly identifies the portrayal of asylum seekers as problematic. Drawing on research by Rajaram (2002) and Way (2009), she writes that "young men through virtue of their bodies are marginal to the trauma images of refugee advocacy and sidelined from the 'marketing' of the refugee cause" (Judge 2010, 12). Bigo (2014) has called this a "biopolitical logic" which leads to a concern about the body as central to both advocacy and discrimination. This approach limits the political agency of male youth asylum seekers (Judge 2010, 8). The racialised framing of migrant and asylum-seeking girls, boys and young men (and the consequent harm they suffer) is also a theme in the literature on detention (Griffiths, 2015; Canning, 2017). The harms are compounded for LGBTI+ migrant children and youth and those with disabilities.

Carly McLaughlin (2017, 2) writes that activists may also inadvertently promote such an approach when they campaign for the provision of children services. She gives the example of the Dubs campaign that "foregrounded the innocence and vulnerability of these children" which in turn led to an image of the "deserving child". She writes:

> Within hours of the arrival of the first so-called Dubs children, which was captured by a heavy media presence, doubts raised by right-wing tabloids and politicians about their age were quickly followed by allegations against "bogus child refugees". (2017, 2)

Crawley writes (2007, 18–19) that:

> Chronological age is both significant and insignificant. For the asylum process and for the provision of welfare and education support, an individual's chronological age … has huge implications and is highly significant. Chronological age is much less significant for children and young people themselves.

For the young people what matters is how they can cope with their new life situations in foreign countries and without adult family members responsible for them.

Rules of Exclusion versus Bright Line Rules

States invest in young people, but nationality is often used as a proxy for strong connections with the nation state– for instance, the *Tigere* case (2015) [19] in which the UK Supreme Court reviewed the criteria for eligibility for student loans. In 2011 the fees charged by universities were increased. The cost of fees and maintenance are generally financed government loans which are only repaid when students can afford to do so and at an affordable rate. To qualify for a loan a student had to be lawfully ordinarily resident in the UK for three years before the day the academic year began (the lawful residence criterion) and be settled in the UK on that day (the settlement criterion). The effect of the two criteria was to render many students ineligible for student loans. Ms Tigere is a Zambian national who came to the UK in 2001 at the age of six. She has spent the rest of her life until university age in the UK, but at various points her immigration status has varied between irregular and regular status. Her mother overstayed and she herself was unlawfully present in the country until 2012 when she regularised her immigration status. At time of loan applications for university she had discretionary leave to remain in the UK. She had received her entire education in the UK, obtained good grades and wished to go to university. However, despite many university places being offered to her she was unable to take any up as she was not eligible for a student loan. The Supreme Court examined whether either the lawful residence criterion or the settlement criterion breached Ms Tigere's right to education under Article 2 of the First Protocol to the European Convention on Human Rights, or unjustifiably discriminated against her in the enjoyment of that right. The Supreme Court allowed Ms Tigere's appeal by a majority of 3:2. Lady Hale in the lead judgment wrote that Ms Tigere not yet having IRL was not a barrier to her obtaining loans. She had established private life in the UK and therefore

[19] *R (Tigere) v Secretary of State for Business* [2015] UKSC 57, 29 July 2015, on appeal from [2014] EWCA Civ 1216.

she could not be excluded by an absolute exclusionary rule which did not allow for any discretion to consider her unusual circumstances. Lady Hale explained that a bright line rule on education loans which was connected to having ILR was not rationally justifiable. She could see no justification as to why Ms Tigere was any less connected with the UK than an ILR comparator. Further, denial of student loans has a very severe impact upon those it affects ([40]). There was no justification for a "bright line" being drawn where it was: a line could have been drawn more closely fitting the aims of the measure, which would not have excluded Ms Tigere.

The *Tigere* judgment spells out the reasons for having bright line rules. Such rules are designed to promote legal certainty. Without bright lines there can be unfair and unpredictable bureaucratic decisions on a case by case basis which would increase administrative costs in decision making. But if bright lines exclude many meritorious students who are as well connected to Britain as those who are with ILR, they do not serve a legitimate purpose. Similarly, for migrant youth the bright-line age 18 blanket rule can serve to undermine issues of vulnerability and increase precarity.

In *Tigere*, Lady Hale writes:

> First, even if a bright line rule is justified in the particular context, the particular bright line rule chosen has itself to be rationally connected to the aim and a proportionate way of achieving it: see, for example, *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2014] UKSC 35, [2015] AC 49. Secondly, however, it is one thing to have an inclusionary bright line rule which defines all those who definitely should be included. This has all the advantages of simplicity, clarity and ease of administration which are claimed for such rules. It is quite another thing to have an exclusionary bright line rule, which allows for no discretion to consider unusual cases falling the wrong side of the line but equally deserving. ([37])

The consideration here is not just about whether to have bright lines or not. The choice is not a binary one. A more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it, is a real choice for legislators and policy makers, so that every case is not decided in a wholly individualised manner. In *Tigere* Lady Hale comments that such intermediate solutions are possible even in immigration control ([38]).

Following the *Tigere* reasoning, could a bright line rule have been chosen which more closely fitted the legitimate aims of the measures affecting precarious migrant youth? The legitimate aim of the best interests measures is protection of vulnerable youth and, thus, it seems clear that, for children from other nationalities who are in a comparable position, a bright line rule should be shifted closer towards the position currently enjoyed by British "staying-put" youth. For all of them, childhood does not end abruptly at age 18 but now encompasses an extended period of personal, social and physical development up to the age of 21.

Age as Categorical Inclusion

The discussion of the *Tigere* case and bright line rules indicates that a bright line rule should be closely tailored to the legitimate aims in policy and in law. It should not be exclusionary without any scope for consideration of individualised situations. However, bright line rules are required for the sake of legal certainty of inclusion – who will benefit from the intervention? This raises the question of how far age boundaries are required as bright line guidance and how far are these absolute rules of exclusion.

Jason Hart (2006, 6) writes that all agencies, at all levels are now "saving" children as a distinct category. For most interventions the category is that of under-18s as that is well established by law. Yet, such a boundary cannot be reified in a simplistic manner without regard for the life situations of migrant youth. In physiology and in psychology there is no

scientific certainty about adulthood. The onset of rationality and maturity varies from person to person and therefore the number 18 should not operate as a sharp transition point.

An article in *The Lancet* journal has recently called for a more gradual approach to the change from childhood to adulthood (Sawyer et al 2018). Adolescence encompasses elements of biological growth and major social role transitions, both of which have changed in the past century. There are two opposing trends in determining adolescence. On the one hand, there is earlier puberty in nearly all populations, but, on the other hand, physiological growth continues far longer now and elongates adolescence well into the 20s. Most important is the associated social change. Nowadays, youth take longer to assume adult roles such as completing their education, getting married and assuming parental responsibilities. Redefining adolescence as a longer period that covers the shift from childhood into full adulthood is of vital importance as it determines how laws and policies for young people will operate and whom these will target. Mayall (2000, 243) points out that children and childhood have become the object of massive interventions. The notion of children's needs – derived from professionals' concepts, assumptions, priorities and goals – justifies these interventions (Woodhead 1997). The *Lancet* article (Sawyer et al 2018) mentions the effects of marketing and digital media on youth, but, for vulnerable migrant youth, their very existence becomes subject to their inclusion within an extended understanding of adolescence. It is important to recognise migrant youth as part of evolving category of adolescents between the ages of 10–21. This would place migrant children between 18 and 21 at parity with comparably placed British youth in care.

We argue that age should be construed as a means of inclusion of categories of youth rather than categorical exclusion. Law can easily categorically include migrant youths. In fact, it is a function of law to create categories which are distinct from real categories in the empirical world to satisfy certain objectives. In law the function of categories is to give a distinct legal

character to the content of the categories (Pottage and Mundy 2004, 1–39). A certain artificiality is acceptable in legal categories so long as there is a rational connection to the purpose of the law. So, a company can be categorised as a person even if biologically it is not a person to decide on legal rights and duties. Similarly, if the objective is to provide protection to vulnerable groups, whether a person is a child precisely at age 18 or at age 19 is not as material as whether they are still vulnerable.

Law makers have the power to mould categories to advance desired policies. For example, Grossman (2008) writes about how legislators in the US redefined "food" and "drugs" to advance administrative objectives. Categories in law can function as administrative categories in response to policy dilemmas (De Zwart 2005). Thus, categories can recognise the existence of an unprotected group and facilitate reduction of inequalities. Lack of life chances for youth (in housing, in education, in employment) is recognised as social problems and these are acute for migrant youth without legal status, many of whom have experienced severe trauma before and during their journeys to the UK.

In order that they should no longer be further traumatised by the threat of exclusion at the age of 18, such problems need to be addressed through specific categorical inclusion.

Conclusion

Sylvia Plath in her poem *Kindness* pinpoints the essence of humanity as its response to the distress of children. She asks: "What is so real as the cry of a child? A rabbit's cry may be wilder But it has no soul." While animal rights jurisprudence may establish the souls of rabbits as well, the human response is to react to the needs of young humans without hesitation. A selective lack of response to precariously placed migrant youths reflects more on the host society and its values than on the young people it fails to nurture.

Migrant youths, like Ali, undertake arduous journeys in their tender years. They flee disturbed regions of the world to encounter traumatic life experiences which continue after

they reach the UK. They remain uncertain of their futures as they are often offered only short-term discretionary leave to remain which expires every few years. Their legal situation remains precarious for years and becomes critical upon turning 18 if they are denied further leave to remain. At this point, they enter detention or live in constant fear of detention, many "disappearing" from official view. Thus, the vulnerability of traumatised youth spills over into their early adulthood years and beyond, resulting in life-long harm, with consequences for future generations.

Using Arendt's concept of a meta-right, we have demonstrated that migrant children without secure legal status require political membership to assert their rights. They can only gain this, at present, by establishing they are below 18 despite the recognition of relative factors of age determination in age assessment proceedings for them and the use of the category 18–21 for comparably placed British youth in care.

Childhood is a historically and socially constructed concept, so its associated rights have varied over time. There is no reason why in modern times when social and medical evidence points towards extended adolescence, a more holistic approach towards age of migrant youth cannot be adopted. A blanket 18 cut-off for migrant children in law dwells on a chronological concept of age which denies any flexibility to youth at the cusp of 18 or just above. The cut-off point at 18 is only there for legal certainty, but when substantive issues of welfare are at stake it should shift to a higher point. The Merton standard in age determination process recognises that a variety of life factors influence age assessments and these can also assist in understanding age in a more holistic manner (not just as physiological or chronological) for migrant youth.

The membership they require to assert their rights is linked to age. Therefore, it is imperative that migrant young people between age 18 and 21 should also be treated as a special youth category in a manner like British children in care who are treated as a specific youth group in

the transitory period between childhood and full adulthood. Further, the Merton standard in age determination process recognises that a variety of life factors influence age assessments, and these can also assist in understanding age in a more holistic manner (not just as physiological or chronological age) for migrant children.

Drawing from the extended concept of childhood for children in care, such as the staying-put measures which permit special arrangements until age 21, this paper has argued that the Merton standard could prevent the number 18 from becoming an exclusionary one as it includes individualised elements for assessment of the life conditions of young migrants. Using the UK Supreme Court case of *Tigere* (2015) we have argued that age 18 is a bright line rule of special rights which meets practical needs, such as providing legal certainty to service providers. However, age determination should be primarily about protecting vulnerable young people. When children have special vulnerabilities, their situations require the exercise of additional individualised discretion for which the generalised framework of 18 is inadequate. A parallel situation is that of British children in care who also experience early obstacles in life. Care provisions protect them beyond the age of 18 in recognition of the need for extended periods for them to achieve secure lives.

This paper recommends that similar legislative protection should be provided to asylum-seeking children as well. The only difference between these children and their British peers lies in their national origin. Young people should not be treated differently inside the UK merely because of accident of birth. Instead, the vulnerability of migrant children should be given special consideration in delineating when childhood ends for them. This should determine when they can transition to independent living in a safe place (whether in the UK or outside). When children have special vulnerabilities, their situations can require exercise of additional discretion. Instead of trying to fit them within the generalised framework of 18 as

the start of adulthood, they should be given additional support after individualised assessment.

The end of childhood defined as age 18 appears wrongly to denote the end of society's moral responsibility for migrant youths. The British government and British people have already assumed financial costs and responsibilities for many of them, so it seems poor legal and policy choice to not strengthen their future development in this country.

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